82-5378

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1982

NATHAN BROWN,

PETITIONER

VS.

ZANT

~~STATE OF GEORGIA~~,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF GEORGIA

Ronnie K. Batchelor
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
(404) 296-1500

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1982

NATHAN BROWN,

PETITIONER

VS.

WALTER ZANT, Superintendant
Georgia Diagnostic and Classification Center,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPERIOR COURT OF BUTTS COUNTY

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1982

NO. 82-

NATHAN BROWN,

PETITIONER

VS.

WALTER ZANT, Superintendant
Georgia Diagnostic and
Classification Center,

RESPONDENT

AFFIDAVIT OF COUNSEL TO SUPPORT MOTION TO PROCEED IN FORMA PAUPERIS

I, RONNIE K. BATCHELOR, being first duly sworn according to law, say in support of the application of Petitioner, NATHAN BROWN, to proceed without being required to repay costs or fees:

1.

I am counsel for Petitioner Brown and I have agreed to represent him without fee or reimbursement of any kind.

2.

Petitioner Brown is presently on death row in Jackson, Georgia, under the custody of the State of Georgia.

3.

Counsel was appointed to represent Petitioner at his trial and on direct appeal. This counsel has abandoned Petitioner Brown.

4.

I am informed and believe because of his poverty, Mr. Brown is unable to pay costs and give me security for same. I have been counsel for Mr. Brown since November, 1981, and believe him to be totally indigent.

Because of the urgency in this case, there is insufficient time to obtain an original Petitioner's pauper's affidavit. However, such an affidavit was presented for the Supreme Court of Georgia, a copy of which is attached.

RONNIE K. BATCHELOR
Attorney for Petitioner

Sworn to and subscribed before
me, this 30th day of August, 1982.

Notary Public

My Commission Expires:

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

NATHEN BROWN,)
)
Petitioner,)
)
-v-)
)
WALTER D. ZANT, Warden,)
Georgia Diagnostic and)
Classification Center,)
)
Respondent.)

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, NATHEN BROWN, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No ✓

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the last twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

Yes _____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Nathen Brown

NATHEN BROWN

STATE OF GEORGIA

COUNTY OF BUTTS

SUBSCRIBED AND SWORN TO before me this the 19 day of November, 1981.

Sharon Logsdon

Notary Public

My Commission expires:

9-20-83

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1982

NATHAN BROWN,

PETITIONER

VS.

WALTER ZANT, Superindent
Georgia Diagnostic and Classification Center,

RESPONDENT.

MOTION FOR LEAVE

TO PROCEED IN FORMA PAUPERIS

Petitioner, Nathan Brown, by his undersigned counsel, asks leave to file the attached petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit of indigency is attached hereto.

Respectfully submitted,

RONNIE K. BATCHELOR
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1982

NATHAN BROWN,

PETITIONER

VS.

WALTER ZANT, Superintendant,
Georgia Diagnostic and Classification Center,

RESPONDENT.

ORDER GRANTING LEAVE TO PROCEED

IN FORMA PAUPERIS IN DISTRICT COURT

The verified Petition and exhibits of Nathan Brown, for a Petition for a Writ of Certiorari and for leave to proceed in forma pauperis having been presented to the Court, together with an Affidavit pursuant to 28 U.S.C. §1915 (1964), and it appearing from the affidavit that Petitioner is a person authorized by §1915 to proceed in forma pauperis, it is

ORDERED that Petitioner be and hereby is granted leave to proceed in this Court without prepayment of fees or costs or security therefor.

DATED: _____, 1982.

_____

JUDGE, UNITED STATES SUPREME COURT

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1982.

NATHAN BROWN,

PETITIONER

VS.

STATE OF GEORGIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF GEORGIA

Petitioner, Nathan Brown, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case. Citation of Opinion: Brown v. State of Georgia, 247 Ga. 298, 275 S.E. 2d 52 (1981).

PROCEEDINGS OF THE CASE

1. On May 31, 1979, Petitioner was convicted in the Superior Court of Taliaferro County of murder, armed robbery, two counts of kidnapping, aggravated assault and possession of a firearm during the commission of an attempt to commit a crime.

2. On February 24, 1981, the Supreme Court of Georgia, on appeal, set aside Petitioner's death sentence for armed robbery and remanded with the direction that he be resentenced to life imprisonment in that count. The court also reversed Petitioner's conviction of aggravated assault as an included offense of kidnapping with bodily injury. All other aspects of conviction and sentence were affirmed. Brown v. State, 244 Ga. 298 (1981).

3. On June 9, 1981, Brown filed a timely Petition for Certiorari in the Supreme Court of the United States which denied said petition. Justices Brennan and Marshall dissenting. Docket No. 80-6839.

4. On remittur from the Supreme Court of Georgia, Petitioner's execution date was set for January 29, 1982.

5. A Petition for Writ of Habeas Corpus was filed in the Superior Court of Taliferro County and the execution stayed by the Court on January 26, 1982.

6. The Superior Court of Taliaferro County, on April 16, 1982, denied the petition for Writ of Habeas Corpus.

7. Notice of Appeal was filed on May 17, 1982. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on June 2, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States and Ga. Code Ann. §27-2534.1(b)(7), which provides in relevant part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> * * *
>
> (7) The offense of murder . . . was outrageously and wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

STATEMENT OF THE CASE

On the night of July 26, 1978, the service station where Henry Phillips worked, in Taliaferro County, Georgia, was robbed by the petitioner and his-codefendants, Judson Ruffin and Jose High. Petitioner, Nathan Brown, participated

in the robbery of the gas station, however, Brown did not have a gun at this time, nor did he make any threats or threatening gestures to Henry Phillips or his son, Bonnie Bullock.

Phillips and his 11-year old son, Bonnie Bullock, were kidnapped and taken to a deserted road. There, Henry Phillips and Bonnie Bullock were told to lie face down on the ground in front of their assailant's automobile. Bonnie Bullock was shot in the head and died instantly. Henry Phillips survived gun wounds to the head and arm.

The only evidence adduced at trial connecting Petitioner with the offense was the direct testimony of Henry Phillips and the confession of Petitioner, Nathan Brown, which was introduced over the objection of the defendant. This evidence revealed that the only contact petitioner had with either victim came when Henry Phillips got out of the trunk of the car and grabbed for his son. Nathan Brown poked Mr. Phillips in the stomach with a shotgun, telling him to get back. (R. 164, 185). Petitioner did nothing further to either victim during the entire transaction. There is no evidence from the testimony of Mr. Phillips, from that of the ballistic witnesses, or from petitioner's confession that Henry Phillips or Bonnie Bullock were shot by a shotgun. In fact, the petitioner was in back of the car looking for a rope to tie up the victims when they were shot by his co-defendants.

At trial, the Prosecutor relied heavily on a conspiracy theory in convincing the jury to convict the petitioner of murder. In supporting the conspiracy argument, it was pointed out that one of the co-defendants stated that the witnesses should be killed. However, the petitioner, Brown, did not take his co-defendants seriously, and in fact, believed that the witnesses, Phillips and Bullock, were taken to the deserted road to be tied and left, in order to allow for greater "get-a-way"

time. This is supported by Brown's actions at the scene of the murder, wherein, he went to the rear of the car to secure a rope. It was while he was getting the rope that the victims were shot. It can be easily inferred that the co-defendants wanted Brown out of the way (getting the rope) so he would not interfere with their shooting of the victims.

Petitioner received court appointed counsel to represent him. His counsel at trial and on appeal to the Georgia Supreme Court was also appointed to represent his co-defendants Jose High and Judson Ruffin. Jose High later retained independant counsel. Judson Ruffin was convicted and sentenced to death in a separate trial. The Georgia Supreme Court affirmed in Ruffin v. State, 243 Ga. 95, 252 S.E. 2d 472 (1979).

The jury returned a verdict of guilty on all six indictments. In its instruction to the jury during the sentencing phase of the trial, the trial court charged the jury that in order to impose the death penalty they must find the existence of at least one of the statutory aggravating circumstances under §(b)(7). He also told them it was within their discretion to consider mitigating circumstances and grant life imprisonment. The judge did not define or explain the statutory terms of "outrageously or wantonly vile, horrible or inhuman in that involved torture, depravity of mind, or aggravated battery to the victim." The jury returned a sentence of death on four of the six counts, finding the aggravating circumstances of torture or depravity of mind.

The Georgia Supreme Court held that the murder of the victim was sufficiently outrageous or wantonly vile so as to distinguish it from ordinary murder for which the death penalty is not appropriate. It thereby affirmed the finding of aggravating circumstances as required by statute. Despite the absence of any evidence of torture of either victim, depravity of mind, or serious physical abuse, the Court below upheld petitioner's death sentence upon a finding of serious psychological abuse

of the deceased, Bonnie Bullock. Serious psychological abuse was based upon the fact that the victim asked petitioner's co-defendant not to kill him, and the victim's age and physical characteristics.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF THE DEATH PENALTY UPON A FINDING OF AGGRAVATING CIRCUMSTANCES THAT THE OFFENSE WAS "OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE, OR INHUMAN IN THAT IT INVOLVED TORTURE, DEPRAVITY OF MIND, OR AGGRAVATED BATTERY TO THE VICTIM" AS APPLIED TO PETITIONER WHO PERSONALLY WAS NOT A TRIGGERMAN, DID NOT INTEND TO KILL, NOR ATTEMPT TO KILL, AND DID NOT HIMSELF ENGAGE IN ANY AGGRAVATING CIRCUMSTANCES VIOLATES CONSTITUTIONAL STANDARDS FOR CAPITAL SENTENCING ESTABLISHED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Court, in its decision in Enmund v. Florida, ____S.Ct. _____ (1982) asked itself "whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be enforced." This court must again ask this question, but now, as it applies to the Petitioner, Nathan Brown.

Petitioner was sentenced to death for a murder which he did not commit and under aggravating circumstances which are not attributable to him. His conviction and death sentence rest solely on a felony murder theory. As a perpetrator of an underlying felony, he was found equally guilty of the murder committed by a co-perpetrator. The trial court and the Georgia Supreme Court found petitioner vicariously liable for the murder of

Bonnie Bullock even though the Petitioner did not intend his death.

In affirming petitioner's death sentence, the Georgia Supreme Court imposed a penalty which is disproportionate to the crime. Petitioner possessed no specific intent to cause the death of Bonnie Bullock. Brown's participation in the felony underlying the felony murder conviction does not constitute an offense so outrageously or wantonly vile, horrible or inhuman so as to authorize the imposition of the death penalty nor does it meet this court's test as enunciated in Enmund v. Florida, supra.

This court's exhaustive treatment of the history and applicability of the death penalty and its analysis of all the states' death penalty statutes in Enmund is so complete as to not warrant repetition here. However, certain elements of this treatment, as they can be applied to the case at bar, require such repetition. The Eighth Amendment's Cruel and Unusual Punishment clause is, in part, directed "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." Weems v. United States, 217 U.S. 349, 371 (1910), quoting O'Neil v. Vermont, 144 U.S. 323, 339-340 (1892). The rape of an adult woman, which resulted in the imposition of the death penalty was held disproportionate and excessive in Coker v. Georgia, 433 U.S. 584 (1977). In Coker, and as repeated in Enmund, this court stressed that its judgment "should be informed by objective factors to the maximum possible extent." In the analysis in Enmund, it was shown that most state statutes do not allow for the imposition of the death penalty in felony murder cases and society itself has rejected such a notion. Consistent with these findings, this case stands anathema to

all others where the death penalty was imposed in Georgia. A summary of the death penalty cases from the Supreme Court of Georgia shows that in each one, the defendant sentenced to death was the individual who "pulled the trigger". (Summary of cases attached as Exhibit "A").

This court, in stressing its reliance on objective factors, correctly concluded that the focus of the inquiry must be on petitioner's culpability and not those who committed the killing. Enmund, supra. There are many similarities between Earl Enmund and Nathan Brown. Both were accomplices to a robbery and both were convicted of murder inflicted by co-defendants. Both Earl Enmund and Nathan Brown were separated from the immediacy of the murder and neither intended a death in the commission of their crimes. What separates Nathan Brown from Earl Enmund is that Petitioner took part in a kidnapping so that the resulting murder took place away from the scene of the initial felony. However, it was not this fact that the jury relied on for its finding of aggravating circumstances, rather the jury felt the victim, a child, was psychologically tortured. The facts established that Petitioner said nothing to either victim during the entire encounter other than telling Henry Phillips to get back when he grabbed for his son. He did not torment Bonnie Bullock in any way. Furthermore, Bonnie Bullock pleaded for his life to petitioner's co-defendant and was killed when Petitioner was at the car securing a rope.

Clearly, it was the emotional impact on the jury, of a child pleading for its life and subsequently being murdered, that resulted in the imposition of the death penalty. This inhumanity was attributed to the Petitioner through a purely emotional association by the jury, vicarious liability.

This result does not, under any interpretation, square

with this court's "objective factors" criteria of Enmund. Additionally, the facts of this case run in direct contradiction to the test for imposition of the death penalty enunciated in Enmund. The facts establish that Brown had no intention of participating in or facilitating a murder. Brown's expectations, intentions and actions demonstrate the inappropriateness of death penalty in his case, even as a form of retribution.

Petitioner has suffered the greatest penalty impcsed by law - - death. The Georgia Supreme Court affirmed Petitioner's death sentenced based on his conviction of a felony murder, wherein petitioner did not kill the victim, did not intend the death of the victim, and was not in the immediate vicinity of the murder scene. On this basis, the Court should grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

RONNIE K. BATCHELOR
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

EXHIBIT "A"

SUMMARIES OF DEATH PENALTY CASES FROM THE SUPREME COURT OF GEORGIA

Moore v. State, 213 S.E. 2d 829.

William Neal Moore was convicted of murder and armed robbery death sentence affirmed by Supreme Court. Moore had been a member of the U.S. Army and former military policeman. During the service, he met George Curtis, nephew of victim, Fredger Stapleton. Curtis told Moore of his uncle's money which they later planned to steal. On April 2, 1974, Curtis and Moore had been drinking, they went to Stapleton's house, left when they found an inside door locked. Moore later returned alone, and while entering a bedroom window, Stapleton fired a shotgun at him. Moore fired four or five shots in his .38 caliber pistol at Stapleton, who died from two bullet wounds in the chest. Moore took two wallets and the shotgun.

Moore was 23 years old and was not an experienced criminal. He did everything he could do after being caught, in regard to cooperating with officials, providing true statements and pleading guilty.

Mitchell v. State, 214 S.E. 2d 900.

William Mitchell was convicted of murder, aggravated battery, and armed robbery; death sentence upheld by Supreme Court. On August 11, 1974, Mitchell entered an IGA convenience store, which has just been opened by Mrs. James Carr and her fourteen year old son, Christopher. He pulled a pistol on Mrs. Carr and demanded all the money, which included $150.00 from the cash register, $15.00 in her purse and money from her son. Mitchell forced Chris and Mrs. Carr at gun point inside the cooler, where he shot Chris twice, causing his death and Mrs. Carr four times. During this time, two young boys had entered the store, and Mitchell snapped his gun at them several times, but it would not fire.

Mitchell was 22 years old, had attended college two and one-half years, could read and write the English language. He

pleaded guilty to the charges.

Goodwin v. State, 223 S.E. 2d 703.

Terry Lee Goodwin was convicted for murder and armed robbery, death sentence affirmed. On April 9, 1975, Goodwin was playing pool at the Snack and Rack Parlor with Brad Studdard, a seventeen year old employee at the parlor. They left together and while driving around drank a six pack of beer and smoked marijuana. During a stop, Goodwin demanded Studdard's automobile while holding a butcher knife on him. When Studdard fled into the woods, Goodwin chased him down and stabbed him eighteen times. Goodwin later made phone calls to Studdard's home to inquire about the reward for Studdard's disappearance.

Goodwin had no prior criminal record. He pled not guilty based on mental retardation, which made him not able to understand and effectively waive rights against self-incrimination. He was eighteen years of age.

Moore v. State, 243 S.E. 2d 1.

Carzell Moore was convicted of armed robbery, rape and murder. The death penalty for both rape and murder was affirmed. On December 12, 1976, Moore and Roosevelt Green entered the Majik Market, which was being manned by Theresa Carol Allen, a part-time employee. Moore carried a high-powered -- 30.06 rifle -- and demanded all the money from Allen, which amounted to approximately $446.00. After robbing the store, they forced Allen to leave with them in her car. Both Green and Moore raped Miss Allen, who was only eighteen years old. While Green went to get gas, Moore shot Miss Allen in the abdomen, with a bullet also passing through her arms, which were crossed on her stomach, and then again in the face. Upon Green's return, they tossed her body into the bushes, which was found two days later lying in the wooded, grassy area.

Moore and Green had met in prison. Moore denied being at the scene at the time of crime.

Dobbs v. State, 224 S.E. 2d 3.

Wilburn Wiley Dobbs was convicted of murder, armed robbery and aggravated assault; death sentence affirmed. On December 14, 1973, Dobbs, along with two others, Walter Lee Harris and Charles Burke, drove to a grocery store and gas station owned by Roy Sizemore. Harris asked Sizemore for a gas can so Dobbs could slip in the back door with his sawed-off shotgun. They demanded money from the cash register, took Sizemore's wallet, and a shopper's purse, all totaling $210.00. Dobbs then knocked Sizemore to the floor and fired a shotgun blast into his stomach, killing him. He knocked the shopper unconscious with the butt of his shotgun, and when a delivery salesman entered, he fired a shot at him.

Gibson v. Georgia, 226 S.E. 2d 63.

Samuel Gibson, III, was convicted of murder and rape with the death penalty for both. The Supreme Court upheld the death sentence in the murder charge, but the case was remanded for a resentencing regarding the rape offense. Joan Delight Bryan was alone with her daughter in a farmhouse on April 10, 1975, when Gibson came to her home to inquire about renting a trailer. After showing him the trailer, Gibson asked Bryan for a glass of water, so she let him into the living room. Gibson said he grabbed her, causing her to become hysterical. After unsuccessfully trying to get her rifle, she grabbed for his gun, and he shot her. Gibson then became frightened, so he tried to make it look like rape. Bryan was found with two lascerations and a .32 caliber-wound in her head. There was evidence of resistence and sexual intercourse and sodomy.

Gibson stated he was inquiring about the trailer because he wanted to move from his foster mother's home, however, he

had no job nor any money. Bryan's young daughter witnessed the shooting of her mother, then as Gibson left, he also slapped the child.

Potts v. State, 243 S.E. 2d 510. (Two cases).

Jack Howard Potts was convicted of aggravated assault, kidnapping with bodily injury, two counts of armed robbery and murder. The death sentence for kidnapping and murder was affirmed. The death penalty decision was remanded for re-sentencing in one count of armed robbery. Potts was involved in a continuous inter-county crime spree.

Potts and Norma Blackwell persuaded Eugene Robert Snyder to drive them to Marietta, Georgia, from Shake Rag Community. While Potts was driving, he shot Snyder through the left ear, so Snyder pulled the car keys out of the ignition and requested to go to the hospital. When Potts shot him again in the nose and dragged him out of the truck, Snyder acted unconscious. Since Potts could not find the keys, he walked to the nearby Gurley home where Mr. Gurley's son in law, Michael D. Priest was visiting. Potts said that there had been an accident, so Priest offered a ride to him. Upon arriving at the scene, Potts ordered Priest to drive them to Marietta. On the return trip, Potts shot and killed Priest and then robbed him.

The events all occurred on May 8, 1975; however, in two separate counties. Potts pleaded not guilty by reason of insanity. He had a previous record of robbery, and assault with intent to murder.

Collins v. State, 253 S.E. 2d 729.

Roger Collins was convicted for rape and murder; the fifteen years imprisonment and death penalty were affirmed by the Supreme Court. On August 6, 1977, Rogers, along with William Durham and Johnny Styles was drinking and carousing. Upon seeing Dolores Luster, Collins called her over to his car

and asked her to engage in sexual intercourse. She declined but accepted an invitation to drive her home. Instead, Durham drove the car to a pecan orchard and stopped. Luster told them she was pregnant and had a veneral disease. Collins said if he caught the disease he was going to do something to her. Durham pulled Luster out of the car, and when he began to remove her clothes, she proceeded to remove them herself. During this time, Collins was removing the back seats from the car. Collins, Durham and Styles took turns raping her. Miss Luster kept screaming, "Why me!" Durham was brandishing his knife and stuck it beside her head when he had intercourse with her. Collins and Durham began taking Luster further into the pecan orchard, when Collins returned and got his jack out of the trunk. Collins hit Luster in the head and then gave the jack to Durham. Miss Luster's death resulted from massive head injuries caused by multiple blows of great force.

Testimony was allowed concerning the statement by Collins that he had killed several other people. Collins' argument that his death penalty should not be upheld because his co-defendant, Durham, was only given a life sentence, was without merit.

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1982

NO. 82-

NATHAN BROWN,

PETITIONER

VS.

STATE OF GEORGIA,

RESPONDENT

ON PETITION FOR WRIT

OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

CERTIFICATE OF TIMELY MAILING

I, Ronnie K. Batchelor, a member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on August 30, 1982, with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Petition for Writ of Certiorari on the above-styled case.

RONNIE K. BATCHELOR
Attorney for Petitioner

Sworn to and Subscribed
before me, this 30th day of
August, 1982.

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Sept. 30, 1983

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the copies of the within and foregoing to the Attorney General by placing true and correct copies thereof in the United States Mail, first class postage prepaid, addressed to the Attorney General as follows:

Michael J. Bowers
Attorney General
Room 132
Judicial Building
Capitol Square
Atlanta, Georgia 30334

This 30th day of August, 1982.

RONNIE K. BATCHELOR
Attorney for Petitioner

Application No. 2086

5439

SUPREME COURT OF GEORGIA

ATLANTA, June 2, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

NATHAN BROWN V. WALTER ZANT, SUPT.

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

NATHAN BROWN,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 5407
WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Taliaferro County. Petitioner was convicted of murder, armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and two counts of kidnapping with bodily injury. He was sentenced to death for murder, armed robbery, and the counts of kidnapping; to ten years' imprisonment for aggravated assault; and to five years for the firearms possession. The Supreme Court affirmed the convictions and sentence for murder and one count of kidnapping; affirmed the convictions but vacated the death sentences for armed robbery and the other count of kidnapping and remanded them to the trial court for resentencing to

life imprisonment for the count of kidnapping and as provided by law for armed robbery; and reversed the convictions for firearms possession and aggravated assault because they were lesser included offenses. Brown v. State, 247 Ga. 298 (1981). Certiorari was denied by the Supreme Court of the United States.

The petition, as amended, contains 37 numbered paragraphs, of which 25 allege substantive claims for relief (11-34; 37). Evidence and argument have been presented on only 12 points, however, and the Court will address only these claims for relief. All unsupported allegations will be deemed abandoned and without merit.

The record in this case consists of the affidavit of Petitioner and the record and transcript of his trial in the Taliaferro Superior Court.

1.

In his first claim for relief, Petitioner claims he was denied his right to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments and the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by Walton Hardin. Mr. Hardin was appointed to represent Petitioner on May 17, 1977, approximately nine months after Petitioner's arrest on August 26, 1977 (R. 50-51).

The record contains no pre-trial motions

filed by Counsel, but Counsel made numerous motions during trial. (T. 130; 366; 397; 460; 472; 483; 488; 490). Counsel also challenged the composition of the traverse jury during voir dire, but the motion was overruled. (T. 104-106). At trial, Counsel made no opening statement but reserved the right to make one (T. 125); cross-examined State witnesses (T. 150; 155; 183; 207; 215; 229; 234; 238; 265; 286; 290; 307; 309; 321; 337); gave closing argument during the guilt/innocence phase (T. 404-416); presented two witnesses in the sentencing phase, including Petitioner (T. 448; 463); and gave closing argument in the sentencing phase (T. 491-494).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meets the test. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and the lack of material with which to work. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel was ineffective for failing to investigate the case properly and

interview witnesses. Yet, Petitioner has presented no shred of evidence to show a defense was available which Counsel did not pursue or that witnesses were available but not pursued. The Court cannot find Counsel ineffective for this reason.

Petitioner has also complained of the failure of Counsel to file pre-trial motions, yet has made no showing that any motions, if filed, would have been successful. Counsel did challenge the array of traverse jurors, but the motion was overruled. Petitioner has made no showing that the challenge could have been successful.

Petitioner has also alleged that Counsel was ineffective for failing to challenge the admissibility of Petitioner's confession. A Jackson-Denno hearing was held with Petitioner among the witnesses. (T. 312-339). The trial court ruled the statement was freely and voluntarily given and, therefore, admissible. Id. Petitioner has not shown that the trial court's determination of admissibility was clearly erroneous. Hurt v. State, 239 Ga. 664(2)(1977).

Finally, Petitioner's remaining allegations, such as the proper questions Counsel should have asked on voir dire, relate to strategic and tactical decisions which are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975). Effectiveness is not measured by how another lawyer might have handled

the case. Estes v. Perkins, 228 Ga. 268 (1968).

Accordingly, this claim for relief is found to be without merit.

-2.

In his second claim for relief, Petitioner contends that the jury instructions on intent in the guilt/innocence phase were impermissibly burden-shifting under Sandstrom.[1]

FINDINGS OF FACT

The Court has examined the jury instructions given in the guilt/innocence phase. (T. 418-443). The trial court instructed the jury as to the State's burden to prove every element of each offense, on the presumption of innocence, and on reasonable doubt. Id.

As to intent, the trial court charged:

> "I give you the following definition: a crime is a violation of a statute of this State in which there shall be a union or joint operation of act and intention. I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. I charge you that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but the presumption may be rebutted. I charge you that a person will not be presumed to act with criminal intention, but the trior of facts may find such intention upon consideration of the words, conduct, demeanor,

[1] Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

motive, and all other circumstances connected with the act for which the accused is prosecuted."

(T. 426).

The trial court also defined the offenses with which Petitioner was charged, including malice murder. As the final portion of the instruction on murder, the trial court charged:

"I charge you, members of the jury, that the law presumes that a person intends to accomplish the natural and probable consequences of his acts or acts if that person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily employed to produce death, and thereby causes the death of a human being. The law presumes the intent to kill. This presumption may be rebutted. I further charge you that a person will not be presumed to act with criminal intention, but the triors of the facts may find such intention upon consideration of the words, conduct, demeanor, and all other circumstances connected with the act for which the accused has been prosecuted. The burden is upon the State to prove the act alleged to be criminal is, in fact, a criminal act beyond a reasonable doubt."

(T. 438-439).

CONCLUSIONS OF LAW

The first cited portion of the charge on intent is virtually identical to the charge in Skrine v. State,

244 Ga. 520 (1979), which was found not to violate Sandstrom, supra. The Court finds the presumptions created were permissible persumptions which the jury was free to apply or reject. Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Skrine v. State, supra.

As to the second cited portion of the charge, Petitioner relies on the recent decision of Mason v. Balkcom, No. 80-7344 (former 5th Cir., March 1, 1982), to assert that the instruction on intent violated Sandstrom, supra.

In Mason, the trial court's instruction creating a presumption of intent to kill was found to relieve the state of its burden of proving an essential element of murder. Mason had raised the issue of self-defense. The appellate court noted that in asserting self-defense, Mason was required to admit the facts that activated the presumption. The Court found the instruction clearly fell within the proscription of Sandstrom and was unconstitutional.

Mason is readily distinguished from the case at hand. The jury in Mason, as in Sandstrom, was not told the presumption could be rebutted. Here, the jury was clearly told that the presumption could be rebutted and again reminded that the State had the burden of proving the criminality of the alleged act. Thus, there was no danger of the jury misinterpreting the instruction.

Additionally, the Supreme Court has concluded that this charge did not violate Sandstrom. Cf. Hosch v. State, 246 Ga. 417, 419-420 (1980). Though the Court found that the charge was not error, the Court did not approve its continued use. Id. However, the trial court in Petitioner's case did not have the benefit of the Hosch decision as Petitioner's trial began on May 29, 1979. (R. 51). The

Court concludes that the charge on intent was not error.

In reviewing the charge as a whole, the Court finds the jury was properly instructed in the guilt/innocence phase.

Accordingly, this claim for relief is found to be without merit.

3.

In his third claim for relief, Petitioner claims that the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance was unconstitutionally applied in this case.

FINDINGS OF FACT

The Supreme Court has already concluded that the evidence supports the finding of the (b)(7) aggravating circumstance by a trier of fact beyond a reasonable doubt. Brown v. State, supra, at 303(10).

CONCLUSIONS OF LAW

Findings of the appellate courts are binding upon this Court for the purposes of review. Trop v. Ault, 231 Ga. 750 (1974).

Accordingly, this allegation is found to be without merit.

4.

The Supreme Court has already concluded no actual conflict of interest had been shown where Counsel had represented Petitioner and one of his co-indictees. Brown v. State, supra, at 299(7).

Petitioner has made no showing to the contrary.

Accordingly, this claim for relief is found to be without merit.

5.

In his fifth allegation, Petitioner claims that his Sixth Amendment right to a speedy trial was violated by the length of time he was incarcerated awaiting trial.

FINDINGS OF FACT

The crime occurred in Taliaferro County on July 27, 1976. (R. 51). Petitioner was arrested in Richmond County on August 26, 1976. Id. Petitioner was one of three co-indictees to be tried for the crime, with his trial beginning on May 29, 1979. Id. Cf. Ruffin v. State, 243 Ga. 95 (1979); High v. State, 247 Ga. 289 (1981).

CONCLUSIONS OF LAW

When a deprivation of the right to a speedy trial has been alleged, four factors are to be weighed in a balancing test: length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); Haisman v. State, 242 Ga. 896, 898 (1979).

Here, approximately 2 years and 9 months elapsed between the time of Petitioner's arrest and his trial. Since this 33-month delay could have prejudiced Petitioner,

the Court must evaluate the other 3 factors of the Barker v. Wingo test.

Petitioner has presented no evidence as to the reason for the delay. Absent proof, the Court cannot assume the reason was a deliberate ploy by the prosecution to obtain a tactical advantage at trial.

Secondly, Petitioner never asserted his right to a speedy trial through any type of motion. Petitioner would have the Court attribute the reason for failure to assert this right to ineffective assistance of counsel. However, absent any proof, the Court cannot make such an assumption when the reason for not asserting the right could just as easily have been a tactical decision by defense counsel.

Finally, Petitioner has claimed prejudice from the delay but has made no showing of such.

Thus, the length of delay, standing alone, is not sufficient to convince this Court that Petitioner was denied his right to a speedy trial.

Accordingly, this claim for relief is found to be without merit.

6.

In his sixth claim for relief, Petitioner alleges that the grand and traverse juries were unconstitutionally composed which violated his Sixth and Fourteenth Amendment rights.

FINDINGS OF FACT

Counsel challenged the array of traverse jurors during voir dire, but the motion was overruled. (T. 104-106).

CONCLUSIONS OF LAW

The right to object to the composition of a grand or traverse jury in a habeas corpus proceeding under Georgia law will be deemed waived unless Petitioner shows in the petition and satisfies the Court that cause exists for his being allowed to pursue the objection after the conviction and sentence have otherwise become final. Ga. Code Ann. §50-127(1). Under federal law, an additional showing of actual prejudice is required. Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

The "cause" asserted by Petitioner in this case is that his trial counsel rendered ineffective assistance by failing to file a timely challenge to the grand jury composition and failing to present evidence in an effective manner upon his challenge to the traverse jury composition.

Failure to challenge arrays of grand and traverse juries is not a ground of ineffective assistance or "cause" within the meaning of Ga. Code Ann. §50-127(1). Goodwin v. Hopper, 243 Ga. 193 (1979). Accordingly, Petitioner's challenge to the grand jury composition is deemed waived.

As to the traverse jury, Petitioner has presented no evidence to show that such a challenge could have been successful. Thus, the Court cannot find Counsel ineffective for not prevailing on his challenge.

Accordingly, this allegation is found to be without merit.

7.

The Supreme Court has already concluded that the exclusion of jurors under Witherspoon[2] does not result in a "hanging jury." Brown v. State, supra, at 300.

8.

Petitioner's argument that death-scrupled jurors constitute a representative, cross-section of the community so that their exclusion is unconstitutional was rejected in Smith v. Balkcom, 660 F.2d 573 (1981).

9.

Petitioner's "prosecution-prone" argument was rejected in Smith v. Balkcom, supra.

10.

The Supreme Court has already reviewed the voir dire transcript and concluded there was no violation of Witherspoon in the exclusion of jurors.

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[2] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Brown v. State, supra, at 300(3).

11.

In his eleventh claim for relief, Petitioner alleges that his death sentence is unconstitutional because the death penalty is being imposed artibrarily and capriciously in the State of Georgia.

Petitioner has presented no evidence to support his claim.

Accordingly, the Court finds this allegation to be without merit.

12.

In his twelfth claim for relief, Petitioner contends the jury instructions in the sentencing phase were deficient as to mitigating circumstances.

FINDINGS OF FACT

The Court has examined the charge to the jury in the sentencing phase. (T. 495-498).

CONCLUSIONS OF LAW

The trial court clearly instructed the jury as to mitigating circumstances and the option to recommend agains death. The charge comports with Spivey v. Zant, 661 F.2d 464 (1981).

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations having been found to be without merit or abandoned, the petition is hereby denied.

SO ORDERED, this 16 day of April, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

NO. 82-5373

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NATHAN BROWN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1.

Whether Petitioner's sentence of death violates the principles set forth by this Court in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982)?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Nathan Brown, was indicted by the Superior Court of Taliaferro County, Georgia, in August, 1978 for murder, possession of a firearm during commission of a crime, armed robbery, two counts of kidnapping, and aggravated assault. Following a trial by jury, Petitioner was found guilty of all charges and sentenced to consecutive death sentences for armed robbery, kidnapping, and murder, a five year consecutive sentence for possession of a firearm, and a ten year consecutive sentence for aggravated assault. Petitioner subsequently filed an appeal to the Supreme Court of Georgia. The Supreme Court of Georgia affirmed the conviction and sentence for murder and one count of kidnapping, affirmed the convictions but vacated

the death sentences for armed robbery and the other count of kidnapping, and remanded them to the trial court for resentencing to life imprisonment for the count of kidnapping and as provided by law for armed robbery; and reversed the convictions for firearm possession and aggravated assault because they were lesser included offenses. Brown v. State, 247 Ga. 298 (1981). On October 5, 1981, this Court denied Petitioner's petition for a writ of certiorari, and on November 30, 1981, denied Petitioner's petition for rehearing.

The Petitioner next filed a petition for a writ of habeas corpus in the Superior Court of Butts County, and by Order dated April 16, 1982, that Court denied Petitioner habeas relief. On June 2, 1982, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal the Order of the Superior Court of Butts County. On August 30, 1982, Petitioner filed the instant petition for writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

In its opinion affirming Petitioner's convictions, the Supreme Court of Georgia recited the facts which the jury was authorized to find at Petitioner's trial. Brown v. State, 247 Ga. 298 (1981). Petitioner Brown's case is a companion case to High v. State, 247 Ga. 289 (1981), and Ruffin v. State, 243 Ga. 95 (1979), wherein the facts and circumstances of the crime are fully set forth. The Georgia Supreme Court reviewed these facts under the standard as set out by this Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in holding that the evidence was sufficient to support Petitioner's conviction.

Henry Lee Phillips, the survivor of a murder attempt by Petitioner and co-indictees Judson Ruffin and Jose High, described for the jury the events that occurred during the late evening hours of July 26, 1976. Phillips operated an Amoco Service Station near Crawfordville, Georgia, with his eleven year old stepson, Bonnie Bullock helping him. (T. 159-161). On that evening, a car pulled into the station with three occupants. Phillips recalled the same car being in the station one or two weeks earlier. (T. 160-161, 167-168). Phillips described Petitioner's car and identified a picture of the car as the one he saw on July 26, 1976. (T. 160, 166, 168-169). The three men, one identified as Petitioner, got out of the car and one pointed a pistol at Phillips. Petitioner had a sawed-off shotgun. (T. 164, 171-173). Phillips was forced to leave the booth while money was removed from the register and a demand made for more money. (T. 162). When Phillips told one of the men that there was no more money, one of the robbers grabbed young Bonnie Bullock and told Phillips to get into the car trunk

or Phillips and the boy would be killed. Phillips complied. (T. 162, 183).

Phillips and his stepson were taken into the woods, and Petitioner struck Phillips in the stomach with the shotgun. (T. 162, 164, 167, 176, 192). Phillips and his stepson were told to lie on the ground, and one of the men mentioned getting a rope to tie them up. (T. 164). Phillips then heard shots fired. (T. 164-165). When Henry Lee Phillips regained consciousness, he discovered that his stepson was dead. Phillips himself had been shot in the temple and the wrists. (T. 165, 214).

Phillips identified a picture of Petitioner and two of the accomplices. (T. 171-173). Phillips and other witnesses identified the station's cash drawer, which was found near Sharron, Georgia, where the victims had been shot. (T. 182, 199-202, 204-207, 209). It was determined that about $288.00 was missing from the register. (T. 210, 219).

A Jackson-Denno hearing was held to determine the voluntariness of the statement made by Petitioner to police agents. (T. 311, 336). The police agents told the jury that in an interview with Petitioner, Petitioner implicated co-indictees Judson Ruffin and Jose High. (T. 359-362).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S CHALLENGE TO THE VIOLATION OF THE PRINCIPLES SET FORTH IN ENMUND V. FLORIDA, ___ U.S. ___, 102 S.Ct. 3368 (1982), IS NOT PROPERLY BEFORE THIS COURT ON THIS PETITION.

In this petition for a writ of certiorari, Petitioner seeks to have this Court review whether the imposition of the death penalty under the facts in his case violates the principles set forth in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982). Petitioner asserts, for the first time in any appellate review, that his sentence of death violates constitutional standards for capital sentencing established by the Eighth and Fourteenth Amendments, and set forth by this Court in Enmund v. Florida, supra.

Respondent asserts that as Petitioner has not previously raised this issue in any of the courts below, he is now barred from seeking a review on certiorari of this issue. Rule 17 of the Rules of the Supreme Court of the United States sets forth the considerations governing review on certiorari. This rule indicates that a review on a writ of certiorari is not a matter of right, but of judicial discretion, and the rules set out three examples that are indicative of the character of reasons for granting a review on a writ of certiorari. Each of these examples are situations where a lower court has decided a federal question. The rule sets forth no examples of a situation where a review on certiorari would be considered when the federal question has neither been presented to nor decided by a lower court.

Additionally, in Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), this Court held that unless it appears on the record that a federal question was both raised and decided in the State Court below, the United States Supreme Court's appellate jurisdiction fails.

Respondent respectfully submits that this federal question presented in this petition for a writ of certiorari has never been raised, preserved or passed upon in the Georgia Courts, and that thus, the petition for writ of certiorari should be denied for lack of jurisdiction.

II. PETITIONER'S SENTENCE OF DEATH DOES NOT VIOLATE THE PRINCIPLES SET FORTH IN ENMUND V. FLORIDA, ___ U.S. ___, 102 S.Ct. 3368 (1982).

Petitioner alleges that under the principles set forth in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982), the death penalty was unconstitutionally applied to him. Specifically, Petitioner alleges that his conviction and death sentence rest solely upon a felony murder theory, and that as such, his murder conviction does not constitute an offense so outrageously or wantonly vile, horrible or inhuman so as to authorize the imposition of the death penalty.

In its decision affirming this conviction, the Supreme Court of Georgia conducted a Sentence Review and found that the evidence presented at trial substantiated and supports a finding of Ga. Code Ann. § 27-2534.1(b)(7), i.e., that the offense of murder was outrageously or wantonly vile and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim. In its opinion, the Georgia Supreme Court held that:

> "Under the evidence in this case, the appellant and his two-conspirators planned the armed robbery of the service station with the express intent to eliminate any witnesses to the crime. They kidnapped the manager of the station along with his eleven year old stepchild at gunpoint. The young boy, Bonnie Bullock, was 56" tall and weighed 70 lbs. The stepfather was placed in the trunk of the

car while the young boy rode inside the vehicle with his abductors. The appellant in his confession admitted that, as they drove the victims to an area in which they could be executed, Jose High taunted the young boy with the prospect of his own death to the point that the young boy was begging for his life. When the robbers reached the execution site, the boy's stepfather attempted to go to him, but was struck in the stomach by the butt of a shotgun weilded to the appellant. Both victims in the case were forced to lie on their faces on the ground in front of the automobile at gunpoint and were shot in the head in a cold blooded, execution fashion. According to the appellant's statement, as the three then drove away from the site, they laughed about the murder. All of the conspirators were laughing, and the appellant related to the others, 'We ain't got nothing to worry about, they're both dead.' One of the conspirators told the appellant that he put three .32 caliber bullets into the boy's head and two into the man's head. The appellant then told Jose High that he should not have cut loose with both barrels of his shogtun, as 'one should have been enough with those .32's.'"

Brown v. State, supra, at 303.

The Georgia Supreme Court concluded that, "[t]he appellant, while not the actual triggerman, was present and actively participated in all aspects of the crime, including the psychological torture of the victim," and that "this murder of the eleven year old victim was outrageously or wantonly vile, horrible or inhuman in that it is distinguishable from ordinary murders for which the death penalty is not appropriate." Brown v. State, supra, at 304.

Respondent submits that the facts of Petitioner's case regarding his participation in the crime are easily distinguishable from the facts in Enmund. The evidence established that the Petitioner was positively identified by the surviving victim of the crimes. In addition, the Petitioner made a complete and full confession. His fingerprints were found on the car identified as the vehicle used in the robbery. The Petitioner in his statement said, "Judson got .32 and walked up to the booth . . . I got out my single-barrel shotgun" and "loaded a .32 revolver with different shells in Augusta." The Petitioner was also identified by the surviving victim as having a shotgun at the time of the robbery, and at the time he was removed out of the trunk of the car and shot. Brown v. State, supra, at 301.

Respondent submits that given this set of facts, no issue has been raised as to the direct and active participation of Petitioner in the murder of Bonnie Bullock and the other crimes surrounding the murder. Contrary to Petitioner's argument, his conviction and death sentence do not rest solely on a felony murder theory. A review of the transcript of Petitioner's trial reveals that Petitioner was charged with malice murder, not felony murder. (T. 419-420). In its instructions to the jury, the trial court instructed the jury on the law of malice murder. (T. 435).

Furthermore, Respondent submits that a careful reading of Enmund clearly indicates the very limited nature of the Court's decision. Enmund received a death penalty on the basis of accomplice liability in a felony murder situation. As discussed previously, felony murder was not involved in Petitioner's case. Additionally, this Court accepted the statistics presented by the Petitioner in Enmund and stated that of the 796 inmates under sentences of death for homicide, only 16 were not physically present when the fatal assault was committed and of these 16 prisoners, only 3, including Enmund were sentenced to die without a finding that they hired or solicited someone else to kill the victim or participated in the scheme designed to kill the victim. See Enmund v. Florida, supra, at 3375-3376. Therefore, according to these statistics cited by this Court, there are arguably only 3 persons on death row, nationwide, who might possibly be affected by the decision of this Court in Enmund.

Respondent asserts that because of the statistics upon which this Court relied, it appears that except for those cases delineated by the Court, the Court was announcing a prospective rule to prevent the imposition of the death penalty in those cases involving felony murder, where no intent to kill was shown on behalf of the accomplice to the underlying felony.

The case before this Court is factually and legally distinguishable from that case in Enmund v. Florida, and therefore, Respondent respectfully submits that this issue does not warrant review by this Court.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari filed on behalf of the Petitioner, Nathan Brown.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon to:

Ronnie K. Batchelor
4179 Memorial Drive
Decatur, Georgia 30032

This 1st day of October, 1982.

Virginia H. Jeffries
VIRGINIA H. JEFFRIES

NO. 82-5373

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CERTIFICATE OF FILING UNDER RULE 28

I, WILLIAM B. HILL, JR., A Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on October 1, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition in the above-styled case.

WILLIAM B. HILL, JR.

Sworn to and subscribed
before me this ____ day
of September, 1982.

NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires June 11, 1986